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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 27 2010

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software consulting company. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the certified ETA Form 9089, and by extension, the proffered position, did not require a member of the professions, as the ETA Form 9089 stated at section 14 that "education equivalency based upon a combination of education and experience is acceptable." The director then determined that that some credential other than a four-year bachelors' and five years of work experience were acceptable. The director also determined that even if the position were found to be for an advanced degree professional, the beneficiary did not possess a four year foreign baccalaureate degree equivalent to a four-year U.S. baccalaureate degree.

On appeal, counsel states that the director erred in concluding that a three year degree combined with an additional post graduate year of education from the same university was not the equivalent of a four year U.S. baccalaureate degree. Counsel states that the petitioner has already submitted an evaluation from the Trustforte Corporation that concluded the beneficiary held an equivalent to a U.S. bachelor's degree. Counsel also notes that the petitioner already submitted a copy of a letter dated January 7, 2003, written by [redacted] that state it is not the intent of the regulations that tony a single foreign degree may satisfy the equivalency requirements. Counsel states that although such correspondence may not be binding on the USCIS, the letter supports the petitioner's position that the beneficiary bachelor's degree and post graduate diploma are essentially the same as a four-year bachelor's degree.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The beneficiary possesses a foreign three-year bachelor's degree *and*. The Trustforte evaluator examined both the beneficiary's three year degree in English Arts and his one year Post Graduate Diploma in computer science and concluded that the beneficiary had attained the equivalent of a bachelor's degree from an accredited U.S. university. Thus, the issues *is whether the beneficiary's two degrees from the same university are the foreign degree equivalent to a U.S. baccalaureate degree.[2] We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification. The AAO, however, will first examine the director's statement with regard to whether the proffered position qualified for second preference advanced degree classification.

Minimum Requirements for Proffered Position

In his decision, the director determined that the proffered position did not require a member of the professions holding and advanced degree or the equivalent as stipulated under Section 203(b)(2) of the Act. He based his determination on the following language contained in Section 14 of the certified ETA Form 9089: "Education equivalency based upon a combination of education and experience is acceptable."

The AAO notes that the language contained in Section 14 (commonly known as the *Kellogg* language) refers to Section 656.17(h)(4) of the PERM regulations that provides:

> (i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and
>
> (ii) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[2] The director in his denial of the petition did not raise the issue of whether the beneficiary possessed the requisite five years of work experience prior to the 2006 priority date. Upon review of the record, the AAO also does not view the beneficiary's prior work experience as an issue in these proceedings.

This section of the PERM regulations is based on the Board of Alien Labor Certification Appeals (BALCA) holding in the pre-PERM case of [redacted] 1994-INA-465 (Feb. 2, 1998) (en banc). In *Kellogg,* the Board held that where the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, the employer's alternative requirements are considered to be unlawfully tailored to the alien's qualifications, unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable. In *Federal Insurance Co.*, the BALCA panel found that no evidence or explanation had been presented as to why it was essential for the *Kellogg* language to appear on Form 9089, other than to act as a legally binding acknowledgement or attestation by a petitioning employer that it followed the *Kellogg* requirement. BALCA held that, "because the existing Form 9089 does not reasonably accommodate an employer's ability to express this attestation, we hold that it would offend fundamental due process to deny an application for failure to write the attestation on the Form 9089."

The panel also noted that the current Form 9089 very clearly did not include a Section that even suggests that it would be the correct place to write the *Kellogg* attestation, or that Section 14 would be the correct place to place the *Kellogg* language. The panel notes that while the regulation explicitly requires that the PERM application include the *Kellogg* language where it applies, there is not effective notice to the public on how to comply with the requirement. While the USCIS is not bound to the findings of the BALCA panel, it does find their reasoning with regard to the placement of the *Kellogg* language on the ETA Form 9089 to be of guidance. Further USCIS has consulted with the DOL pursuant to its statutory consultation authority at 8 C.F.R. § 204(b). The DOL position is that the placement of the Kellogg language on the ETA Form 9089, based on the *Federal Insurance* decision does not reduce the actual minimum requirements below a bachelor degree -- DOL would interpret the language as permitting alternatives to a bachelor degree that are equivalent to a bachelor degree. Thus, the *Kellogg* language would supplement the primary and alternative requirements but would not lower the educational bar further. In the instant matter, the petitioner would still need to establish that the beneficiary possesses a U.S. baccalaureate degree or equivalent foreign degree in computer science with five years of work experience. Thus the proffered position does qualify for EB2 visa preference classification. The director's comments on this issue are withdrawn.

Eligibility for the Classification Sought

As noted above, the ETA Form 9089 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone

unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

On appeal, counsel relies on a letter from [redacted] Citizenship and Immigration Services' (USCIS) Office of Adjudications. The letter discusses whether a "foreign equivalent degree" must be in the form of a single degree or whether the beneficiary may satisfy the requirement with multiple degrees. The Office of Adjudications letter is not binding on the AAO. Letters written by the Office of Adjudications do not constitute official USCIS policy and will not be considered as such in the adjudication of petitions or applications. Although the letter may be useful as an aid in interpreting the law, such letters are not binding on any USCIS officer as they merely indicate the writer's analysis of an issue. *See* Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (Dec. 7, 2000)

Rather, the AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.,* 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."[3] In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree.

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[3] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

8 C.F.R. § 204.5(k)(2). As explained in the preamble to the final rule, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor's degree may qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. 56 Fed. Reg. at 60900.

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree." For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). *Cf.* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability").

The AAO notes that on appeal the petitioner states that because the beneficiary's three year bachelor's of commerce and his one year Post Graduate Diploma in Computer Applications were received from the same university, these combined studies are the equivalent of a U.S. baccalaureate degree in computer science.

The AAO does not find counsel's assertions persuasive. First, as discussed previously, the combination of two degrees is not found to be the equivalent of a four year U.S. baccalaureate degree. Second, the AAO notes that the petitioner with the initial petition submitted a copy of a certificate from Singer Systems, [redacted] that states the beneficiary completed a course entitled "Post Graduate Diploma in Computer Application" undertaken from October 10, 1995 to July 15, 1996. This certificate identifies the course contents as "MS-Dos, Basic, Fortran, Cobol, Pascal, Foxpro, C++, and MS-Windows." The petitioner also submitted another certificate from Softech India Computer Systems for a computer course in typesetting taken from June 19, 1995 to August 27, 1995, and a second certificate from Singer Systems for a two month course in Auto Cad taken from February 6, 1995 to April 29, 1995.

The petitioner also submitted a copy of the beneficiary's diploma from the [redacted] that indicates the beneficiary's three year baccalaureate degree was in English and that he was found qualified to receive the diploma as of April 1995. The record contains a transcript of the beneficiary's courses in his baccalaureate program in English but no identification of specific coursework.

In response to the director's RFE dated October 24, 2007, the petitioner submitted the Trustforte Corporation academic evaluation dated January 11, 2008 written by [redacted] The petitioner also submitted a document entitled "Course Completion Certificate" and is issued by the Directorate of Distance Education, [redacted] It indicates that the beneficiary completed a course of study in P.G. Diploma in Computer Applications taken from July 1995 to June 1996. The record contains no transcripts for this program of studies.

In his evaluation, [redacted] describes the beneficiary's studies based on the document from [redacted] as an advanced bachelor's level academic studies with a concentration in computer applications and further states that this post graduate program in computer applications satisfies the academic requirements for a bachelor's level concentration in the field of computer science. [redacted] concludes by stating that the beneficiary has the equivalent of a bachelor of science degree with a dual major in English and Computer Science from an accredited U.S. college or university.

The AAO notes that the record contains conflicting evidence. Both the Singer coursework and the claimed university courses overlap for a significant period of time. The petitioner provides no explanation or clarification as to the two pieces of evidence submitted to support the beneficiary's post graduate studies in computer studies or whether the Singer coursework was offered under the auspices of the university. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

The AAO would question whether the coursework offered through the distance learning branch of the university was at a university-level, rather than a vocational level. The Singer coursework appears to be at a vocational level.[4] Due to the conflicting evidence in the record, the AAO would give only limited weight to the Trustforte Corporation academic evaluation. Thus, the AAO would only consider the beneficiary's three year program of university-level studies in English when considering whether the beneficiary has a U.S. baccalaureate degree or a foreign equivalent degree.

Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," the beneficiary does not qualify for preference visa classification under section 203(b)(2) of the Act as he does not have the minimum level of education required for the equivalent of an advanced degree.

Qualifications for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

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[4] The AAO notes that the [redacted] is listed as one of the beneficiary's earlier employers. Thus, this computer coursework could have been part of a training program for new or potential employees.

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu,* 736 F. 2d at 1309.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In this matter, Part H, line 4, of the labor certification reflects that a bachelor's degree in computer science is the minimum level of education required. Line 6 reflects that 60 months of work experience is required for the job, and line 7 and 7-A indicate that the petitioner would accept the alternate fields of study of engineering, math, business, physics or information systems. Line 9 indicates that a foreign educational equivalent is acceptable. Line l4 indicates that five years of work experience in the software industry with at least two years of Java/J2EE, XML, Rational Rose and Eclipse IDE were required.

The beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," and, thus, does not qualify for preference visa classification under section 203(b)(2) of the Act. In addition, the beneficiary does not meet the job requirements on the labor certification. For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.